DATE: April 20, 2012

TO: Ernie Hall, Assembly Chair
    Assembly Members

THRU: Dennis A. Wheeler, Municipal Attorney

FROM: Dean T. Gates, Assistant Municipal Attorney

SUBJECT: 2012 ELECTION ISSUES
    DEPT. OF LAW MATTER NO. 12-1374

QUESTIONS: The Assembly requested we address the following questions:

A. When voters are denied the opportunity to vote because of a lack of ballots, what are the standards and remedies applied by the courts in determining whether a new election is required?

B. May the Assembly call for a special election even if the failure is not sufficient to change the outcome?

BRIEF ANSWERS: Subject to the following Background and Discussion, our Brief Answers are:

A. Before a court may order a new election in an election contest case, a finding of malconduct, fraud or corruption affecting a number of votes sufficient to change the result of the election is required.

First, each alleged irregularity should be analyzed to determine if it is malconduct, which is a “significant deviation” from prescribed norms that either (1) introduce bias into the election, or (2) was done knowingly or with reckless disregard to the norms.

Second, the specific number of votes affected by that instance of malconduct should be determined, if possible.
Finally, the courts require that concrete standards be applied to determine if the total votes affected by malconduct are sufficient in number to change the result.\(^1\) The standards are:

1) If malconduct injected bias into the vote which favors one candidate or proposition outcome over another and:
   a) the number of votes affected can be ascertained, then all votes are awarded to the disfavored candidate or losing proposition to determine if the result would change.
   b) the number of votes affected cannot be determined, then a new election may be called, depending on the nature of the bias and margin of votes separating the candidates.

2) If malconduct affects individual votes randomly (no bias injected) and:
   a) the votes can be identified, then count or disregard the votes.
   b) the ballots were commingled, the number of contaminated votes are to be deducted from vote totals of each candidate in proportion to the votes received by each candidate in the precinct or district where the contaminated votes were cast.
   c) a specified number of votes should have been counted but are not available for counting, add to the vote totals of each candidate in proportion to the votes received and counted by the candidate in the precinct or district.

When there is uncertainty regarding the outcome, courts make all presumptions in favor of the validity of the election, to recognize the strong public interest in stability and finality of an election and to not disenfranchise those who legally voted. If there is a finding of malconduct or corrupt practices, the Hammond proportionality formula should be employed to determine if it is sufficient to change the result of an election and cast it in doubt.\(^2\)

B. In the words of the Alaska Supreme Court, ordering a new election is an “extreme remedy.” In election contests, the Court has only ordered a new election once—when bias was injected into the vote in a close election.\(^3\) A new election should only be held if evidence of specific instances of malconduct is sufficient to cast the results of the election in doubt, and the true results cannot be ascertained. Should a new election be ordered by the Assembly without this requisite showing, it is likely to be overturned on appeal.

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\(^1\) Hammond v. Hickel, 588 P.2d 256 (Alaska 1978)(per curiam), cert. denied 441 U.S. 907, 99 S.Ct. 1998, 60 L.Ed.2d 376 (1979). This technique is only an analytical tool to aid in the determination of whether contaminated ballots actually would affect the results, and not a means to actually modify official vote totals.

\(^2\) Hammond at 260.

\(^3\) Boucher v. Bomhoff, 495 P.2d 77 (Alaska 1972)(the state election officials wording of a referendum question on the ballot deviated from the prescribed form of the question “Should there be a Constitutional Convention?” and an expert witness showed through survey evidence a 14.7% bias towards voters answers. This bias cast doubt in the election where the vote margin was 439; amounting to 0.6% of the 69,383 total votes cast.)
BACKGROUND:

On the day of the election, April 3, 2012, many precincts ran out of ballots at the polling stations. Some were restocked; others were not restocked or at least not soon enough for some voters. The precincts handled the shortage by employing a few different methods. There are accounts from voters and election officials that some voters were accommodated with sample ballots, copies of ballots, or ballots from other precincts. Some voters were directed to try voting at nearby precincts, or told to wait while additional ballots were delivered. In some instances, voters that were waiting for additional official ballots to arrive at their precinct, or that looked for available ballots at other nearby precincts, gave up and left without obtaining a ballot. There are reports of some voters being unable to vote. These varying circumstances give rise to several questions. This memorandum sets forth the legal standards that courts are likely to apply when analyzing these questions.

DISCUSSION:

This office previously distributed Municipal Attorney Opinion 89-69 addressing a ballot shortage at the 1989 election when voter turnout was unexpectedly high. This discussion reaffirms that opinion and expounds on its analysis.

The Post-Election Process.

After an election, the Election Commission reviews ballots, conducts a public session of canvass, and adopts a report of the results. AMC 28.80.010 et seq. The Election Commission presents its report to the Assembly at the meeting set up for certification of the election. AMC 28.80.060A. The Assembly is to determine if the election was validly held and, if it was, then certify the election results. The Election Commission’s report to the Assembly may describe problems with the election that cast doubt on its validity.

If the election commission reports a failure to comply with the provisions of law or illegal election practices, and that such failure is sufficient to change the outcome of the election, the assembly may exclude the votes cast in one or more precincts where such failure or illegal practices occurred from the total return or may declare the entire election invalid and order a new election.

AMC 28.80.060B. (emphasis added). In addition to consideration of the Election Commission’s report, the Assembly may contemporaneously deal with an election contest. Within five days after the Election Commission adopts its report of the results of the election, a candidate or ten qualified voters may file a “notice of contest of an

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4 For purposes of this opinion, we assume the facts as stated herein are accurate.
election” with the Municipal Clerk. AMC 28.100.020. A contest comes before the Assembly at the same meeting as the commission’s report.

The assembly shall vote whether to hear the contest or to certify the results of the contested election at a meeting held pursuant to AMC 28.80.060.A in accordance with the report of the election commission. If the assembly decides to hear the contest, it may appoint one or more persons to take evidence concerning the grounds for the contest and report to the assembly.

Even if the Assembly determines to certify the election, such certification is subject to the outcome of an election contest. AMC 28.80.060.A. After certification, unsuccessful election contestants have 10 days to file an appeal to court. AMC 28.100.030. And, if the Assembly declares the election invalid that decision may also be appealed to a court. There are limited persons and grounds for bringing an election contest:

1) A candidate or ten qualified voters may contest the election of any person or the approval or rejection of any question or proposition upon one or more of the following grounds:

   a) Malconduct, fraud or corruption on the part of an election official sufficient to change the result of the election.
   b) That the person certified as elected is not qualified as required by law.
   c) Any corrupt practice as defined by law sufficient to change the result of the election.

AMC 28.100.010.5 Other than a recount, an election contest is the exclusive procedural means provided by law for challenging the results of an election. A high standard is applied by courts reviewing post-election contests, one purpose of which is to “discourag[e] parties from mounting post-election challenges just because they are displeased with the results.”6 The following questions and analysis discuss how the Alaska Courts may handle the aforementioned issues.

A court reviewing an election contest is first charged with recognizing “the public has an important interest in the stability and finality of election results”7 and therefore “every reasonable presumption will be indulged in favor of the validity of an election.”8 An important consideration is whether a decision that results in the disenfranchisement of the voters whom did vote is warranted, thereby depriving the electorate of the fruit of their

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5 State statute has identical language for election contests, see AS 15.20.540. The history notes show this section became law in 1960 and has not changed since. The case law discussed in this memorandum interpreting that statute is a clear indication of how courts will interpret and apply the Code.


exercise of the right to vote. Therefore, ordering a second election is not a favored remedy. "The [election] nullification remedy invalidates a multitude of first election legal votes, passes the choice to the inevitably different electorate that turns out for a second election, and accepts the second election biases and distortions .... Proration, by comparison, has the virtue of neutrality; and in election contests, neutrality is a major constituent of fairness."\(^9\)

A. When voters are denied the opportunity to vote because of a lack of official ballots, what are the standards and remedies applied by the courts in determining whether a new election is required?

In order for election contestants to be successful, they must carry the dual burden of showing a significant deviation from the prescribed norms (malconduct) and that such departure was of a magnitude sufficient to change the result of the election.\(^11\)

A.1. Malconduct. Significant deviation injecting bias or significant deviation due to knowing disregard or reckless indifference.

Election contestants must show more than a lack of total and exact compliance with the constitutionally and statutorily prescribed form of ballot.\(^12\) The _Hammond_ court set forth steps required to analyze whether alleged irregularities support a finding of malconduct due to a significant deviation:

> We believe each alleged deviation from a statutorily or constitutionally prescribed norm must be analyzed individually to determine if it is "significant" and to ascertain if it involves an element of scienter. Once it is determined that the individual instance of noncompliance amounts to malconduct, a determination must be made of the number of votes affected. The total number of votes affected by all such incidents must then be considered in ascertaining whether they are sufficient to change the result of the election.\(^13\)

_Hammond_ recognized that Alaska elections are conducted by many volunteer workers, and that minor irregularities and other good faith errors and omissions may be anticipated, although not condoned. The courts do not generally allow a finding of a

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\(^9\) 165 A.L.R. 1263 (originally published in 1946).


\(^12\) Boucher at 80.

\(^13\) Hammond at 259. "Scienter" means knowledge by the misrepresenting party that material facts have been falsely presented or omitted with an intent to deceive. Black's Law Dictionary, 6th ed. Abr. (1991).
“cumulation of irregularities” sufficient to support a new election. Instead, each irregularity must be analyzed on its own merits.

The Hammond court defined two categories of malconduct: that which introduced a significant bias into the vote and that which did not introduce bias. If bias is introduced into the vote, malconduct exists if the bias can be shown to be the result of a significant deviation from lawfully prescribed norms. If the election irregularities do not cause bias in the vote, but rather have a random effect on the casting of votes, then the standard for an election challenge is higher: significant deviations from prescribed norms will only amount to malconduct if they are “imbued with scienter, a knowing noncompliance with the law or a reckless indifference to norms established by law.” Under this latter standard, evidence of an election official’s “good faith” is a defense to malconduct.

Restated, malconduct results when the significant deviation either:

1. **caused bias; or**
2. **was done knowingly or recklessly.**

**Bias.**

Some people did not vote, despite their own efforts. Our initial review of their direct or forwarded submittals to Election2012@muni.org indicates the total number is very small - especially as a percentage of total voters. As of April 18, our review has the number at less than 20 confirmed. Nevertheless, some suggest the ballot shortage had the effect of injecting significant bias into the election.

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14 *Id.* The Hammond court stated an accumulation of irregularities may in “rare circumstances” so permeate an election with numerous serious violations of law that substantial doubt will cast on the outcome of the vote, and cites to *In re Contest of Election of Yetsch, 71 N.W.2d 652* (Minn. 1955). That case tossed out all ballots from one precinct where election officials were not qualified, not trained properly, mishandled ballots before, during and after the election, failed to comply with polling station operations required by law, had 59 ballots unaccounted for after the election, allowed numerous opportunities for fraud to occur, and tallied results that were in excess of the number of registered voters in the precinct and greatly disproportionate to the typical results from all other precincts. In addition, the “rare circumstances” that allow a finding of malconduct by the accumulation of irregularities would still require the showing of the number of votes affected and that number would cast doubt on the true results.

*See 26 Am. Jur. 2d § 342 “Overturning election based on irregularities.”* In the Minnesota case, there was a 77 vote margin between winner and challenger, and throwing out the one precinct had the effect of overturning the election results.

15 *Id.* at 259, citing Boucher.

16 *Id.*

17 An election official includes “election officials at the polls, early or absentee voting officials appointed by the clerk, the Election Commission or canvass board, the data processing board, counting terms, receiving teams, the clerk, and the clerk’s office staff.” AMC 28.10.040.
Bias exists when there is a predisposition to vote a certain way. In *Boucher v. Bomhoff*, the wording of a referendum question on the ballot asking whether a constitutional convention should be held did not comply with the constitutionally required form of the question, and the court found the wording inherently misleading. The *Boucher* Court ruled the wording injected bias directing voters towards an affirmative vote, and that bias was sufficient to change the result of the referendum because an expert witness' survey showed a 14.7% affirmative bias produced by the defective form of the question. A ballot shortage or delay at the polls may not inject the sort of significant bias contemplated by *Boucher*, because these failures do not predispose a voter to vote one way or the other or indicate a significant bias greater than 5-7% which was held constitutionally permissible. A review of preliminary results shows no discernable connection between ballot shortages and the precinct by precinct percentages in the two high profile races - the races for Mayor and Prop 5.

One possible way to gauge whether the possibility of bias exists is to look to the precincts that did run out of ballots and compare whether their results in the key races are significantly different than the results of the precincts that did not run short.

We anticipate the Assembly will reach its own conclusion, once more conclusive results are available.

**Knowing Noncompliance or Reckless Disregard.**

In regards to the April 3, 2012 Municipal election, the overarching issue is the lack of sufficient ballots at certain precincts, at certain times. Was this a significant deviation from a norm prescribed by Code, either through a knowing noncompliance or reckless disregard? AMC 28.40.010B. requires the Municipal Clerk to “ensure ballots are prepared for at least 70 percent of the registered voters within each precinct to present all candidates and propositions to the voters.” According to the information known to this office, a sufficient number of ballots were prepared. But, for a number of reasons, not enough were at the precincts. The Code does not explicitly call for all ballots to be at the precincts. In fact, having all the ballots at the precincts would substantially frustrate early absentee voting, voting absentee by mail, and being able to vote at the alternate polling stations. According to the Municipal Clerk, holding a percentage of the ballots at City

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20 *Id.* The election results were 34,911 yes votes and 34,472 against, a 439 vote margin that was only 0.6% of the total votes cast. In *Boucher*, the bias to vote in a particular fashion was created by the election officials who wrote the legally defective ballot language. In *Sonneman v. State*, 969 P.2d 632, 639 n.7 (Alaska 1998), the court recognized the random determination of fixed ballot positions could result in a 5-7% positional bias favoring one candidate, deciding it was constitutionally acceptable even if an election margin was less than 5%. The court in *DeNardo v. Municipality of Anchorage*, 105 P.3d 136, 139-140 (Alaska 2005), reaffirmed *Sonneman* in finding a claimed 4-5% bias in the mayoral election won by 17 votes in excess of the required 45% plurality was a reasonable burden on the right to vote.
21 *Sonneman* at 639-640; *DeNardo* at 140.
Hall and other key locations has been the long-standing practice. That practice has been augmented by training poll workers to watch their ballot levels and call for the delivery of additional ballots as needed. We do not think a court would find this practice a significant deviation from the norm amounting to "knowing noncompliance" because it does not violate a clear statutory or constitutional requirement.

The Clerk’s Office’s method of allocating ballots does not appear to be done in reckless disregard of the norms. "Reckless disregard" means a conscious indifference to the consequences of an act or of the harm that one’s actions could do to the interests or rights of another.22 It is substantially greater than ordinary negligence.23 Here, the Clerk’s Office compared ballot deliveries to prior year deliveries and actual voter turnout and in many cases added ballots to increase the cushion. The Clerk’s Office used primarily data from 2011 and 2009 (last Mayor’s race). A future criterion may be that a year with much higher turnout than either 2011 or 2009 be used to set the amount to be delivered to the precincts.

By itself, the lack of ballots at the affected precincts is also not likely a significant deviation through reckless disregard. Municipal Attorney Opinion 89-69 answered this very question, concluding it would not rise to a significant deviation, so long as some form of ballot was available to voters. The evidence available so far indicates the vast majority of voters that did not have a regular ballot immediately available at their precinct either voted a sample or copied ballot, or got a ballot to vote within no more than 1-2 hours, either by waiting at their precinct until it was restocked, or going to another voting location. This is by no means ideal and would certainly be frustrating for people accustomed to shorter waits, but people were able to vote. Election officials did not knowingly or recklessly deny precincts their ballots once notified of shortages.

The use of unofficial ballots, or sample or copied ballots, is also not a significant deviation. Alaska law specifically allows for the use of "unofficial" ballots.24 While our Code does not specifically mention the use of "unofficial" ballots, it also does not prohibit it. As concluded in Municipal Attorney Opinion 89-69, it is not a significant deviation from statutory or constitutional norms to use photocopies or substitute ballots when the supply of official ballots is depleted. It is far better to enfranchise voters with what is available, than to deny them the ability to vote.

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22 Black’s Law Dictionary (9th Ed. 2009). See Lamb v. Anderson, 147 P.3d 736, 744-745 (Alaska 2006)(discussing the punitive damages statute, AS 09.17.020(b), which allows such awards for reckless indifference, which is unreasonably disregarding a known risk of substantial harm to another, and quoting the Restatement (Second) of Torts § 500).


24 AS 15.15.140(a). Justifiable use of unofficial ballots when official ballots are not available has been permissible since territorial days. Territory ex rel. Sulzer v. Canvassing Bd., 5 Alaska 602 (D. Terr. Alaska, 1st Div. 1917); see also Fischer v. Stout at 220-221; and Carr v. Thomas, 586 P.2d 622 (Alaska 1978).
Having to wait for hours at a polling location is also not by itself malconduct.\textsuperscript{25} Instructing persons to try to find ballots at a different polling location was found by the \textit{Hammond} court to constitute an attempt to enfranchise voters and did not support a claim of deprivation of the right to vote.\textsuperscript{26}

We would also note, without offering an opinion on motive, that both the news media and the Minnery communications\textsuperscript{27} may have worsened an already difficult situation. This does not alter the responsibility to have ballots in the right places at the right times, or the responsibility to enfranchise voters whom arrive at the polls even if they have to vote a questioned ballot. But the media reports and Minnery communications are forms of third party action that should be considered as a mitigating factor, because regardless of any alleged run on the polling stations resulting from Minnery’s action the election officials operated to enfranchise voters with materials available to them.

The determinations of a significant deviation injecting bias or borne of a knowing noncompliance or reckless disregard are for the Election Commission’s report to consider and the Assembly to ultimately decide. If the answer to either question is “yes” then a finding of malconduct may be warranted, and only then may an evaluation of the number of votes affected be undertaken, and whether that number is sufficient to change the result of the election.

Given the varying responses to dwindling supplies of ballots at different precincts, it is no small task to look at each precinct’s response alleged to be malconduct in a filed election contest. As an aid in this task, below is a list where the Alaska Supreme Court has made specific holdings regarding what does or does not constitute malconduct.

**Malconduct:**

1. Election clerk taking possession of 2,000 questioned ballots for transport to the elections office left the two bags of ballots in his personal vehicle overnight parked at his residence. In the morning his vehicle was still locked, and the

\textsuperscript{25} \textit{Dansereau}, 903 P.2d at 572.

\textsuperscript{26} \textit{Hammond} at 265-266.

\textsuperscript{27} Apparently, there was a website posting and possibly emails that advised people they could both register to vote and vote in this election, at any polling place. While true in a narrow, strictly technical sense, it is grossly misleading and unnecessarily drained ballots and other supplies from precincts. Yes, precinct workers will let you register and vote (only because they have no authority to deny you), but the vote will not be counted by the Election Commission. You can vote out of precinct, but this generally only happens in small numbers - maybe on average of 10 per precinct. The precincts are generally overstocked with 25 Questioned Ballot envelopes. Many precincts reported significantly more than 25 Questioned Ballots. It is unlikely many people would have on their own initiative gone to just any precinct they could find. But for the Minnery communications, some precincts may not have experienced shortages, although we may not be able to quantify this with any degree of accuracy. We have also been told that some media stories ran during the last hours of the election indicating that some polls had no ballots and gave the impression people could not vote at all. We have not yet confirmed this at the time of this writing.
contents undisturbed. He drove to the elections office, but again parked and locked his vehicle with the ballots inside until they were unloaded by him later that morning. However, this malconduct based on inadequate security against ballot tampering could not change the result of the election because the evidence showed the questioned ballots were not tampered with, there was no reason to invalidate them, and thus they could be counted. Hammond at 260-261.

2. Admitted mishandling: 57 unregistered voters were permitted to cast ballots, 38 ballots improperly counted, and 2 voters wrongfully denied the franchise. Each candidate’s vote count reduced pro rata to reflect the random distribution of ballots invalidly cast for purposes of determining whether the irregularly cast votes, and the two votes denied the franchise, were sufficient to change the result. Hammond at 263.

3. Placing language prefacing a ballot referendum question, contrary to the statute directing how to form the question, which inherently misleads the voter and creates a bias to answer “yes,” calculated at a 14.7% bias rate, is misconduct by the election official that prepared the ballot. Boucher at 82.

Not malconduct:

1. A 2-3 hour wait at an absentee voting station operated in good faith is not malconduct, even if some voters left because they were unwilling to wait. Total of 308 people voted, and two affidavits produced by persons that stated “they did not vote because they were unwilling to endure the hours-long waiting period.” Dansereau at 572 (emphasis in original).

2. Supplying inconsistent and conflicting information to voters regarding policy on cross-precinct or cross-district voting, if acting in good faith attempts to enfranchise voters. Hammond at 266.

3. Allowing cross-precinct voting, an act authorized by statute. (Such persons must vote a questioned ballot.) Hammond at 264.

4. Allowing cross-district voting, because these are subject to challenge before commingled. After commingling such objections are waived. Hammond at 264-265.

5. Uniform application of cross-district voting procedures by election officials.

6. 141 original ballots from two villages were discarded after being counted and included in election results from the districts and the official count certified in a tally book. Circumstances justified a finding that election fraud was unlikely, and in the absence of evidence of corruption or scienter the vote tallies were entitled to be counted by the lieutenant governor in the original tally and recount. Hammond at 261-262.

7. 247 questioned ballots misplaced and discovered in an unlocked cabinet in the election office after certification of the election. Because they were still sealed in two envelopes, and circumstances tended to show they were not tampered with, they were not the instrument of fraud and should be counted and added to the totals, unless otherwise invalid. Hammond at 261.
8. A bag of rejected questioned ballots during a recount, and valid ballots inadvertently left among empty outer envelopes, but kept under adequate security. *Id.*

9. A discrepancy of 80 lost or unaccounted ballots when comparing the number of ballots cast to a number of voters that signed the registry. The number was not of such a magnitude to conclude malconduct. *Hammond* at 263-264.

10. Supplying absentee ballots to personal representatives of voters who did not meet the requisite showing of physical disability required by statute (at the time), because ballots were issued in good faith attempts to interpret and implement ambiguous statutory scheme. *Hammond* at 268.

11. Strict compliance with statute requirements for marking of absentee ballots is not required if the ballots can be objectively determined to have been cast on or before election day. *Hammond* at 269.

12. Computer designated for counting punch card ballots breaks down, a second computer used for counting several districts which also develops problems, then the first computer used to complete the tally. The failure to follow the statute requiring all ballots be recounted on the new computer did not amount to malconduct. *Hammond* at 270.


14. Failure to notify recently married women of the necessity to inform the State of their change of name. *Hammond* at 270.

15. Proposition 2 description and title that is informative but not comprehensively describing the effects, ballot language that is reasonably accurate. *DeNardo* at 142.

### A.2. Sufficient to change the result of an election.

The *Hammond* court determined that merely impeaching the integrity of the election process is not sufficient grounds to place the true outcome in doubt. 28 Concrete standards must be applied to determine if the votes affected by malconduct are sufficient in number to change the result. 29 *Hammond* set forth the following concrete standards:

- If malconduct injected bias into the vote which favors one candidate over another and the number of votes affected can be ascertained, then all votes are awarded to the disfavored candidate to determine if the result would change.

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28 *Hammond* at 258; see 26 Am.Jur.2d Elections § 346 (Those who legally voted should not be deprived of his or her right to vote because of the neglect or carelessness of election officials unless that conduct has been carried to such an extent as to affect the true outcome of the election and put the results in doubt).

29 This technique is only an analytical tool to aid in the determination of whether the contaminated ballots would affect the results, and not a means to actually modify official vote totals. *Fischer v. Stout*, 741 P.2d at 226.
o If malconduct injected bias into the vote which favors one candidate over another and the number of votes affected cannot be determined, then a new election may be called, depending on the nature of the bias and margin of votes separating the candidates.

o If malconduct affects individual votes randomly (no bias injected) and the votes can be identified, then count or disregard the votes.

o If malconduct affects individual votes randomly (no bias injected) and the votes cannot be identified, the number of contaminated votes are to be deducted from vote totals of each candidate in proportion to the votes received by each candidate in the precinct or district where the contaminated votes were cast.

o If malconduct affects individual votes randomly (no bias injected) and a specified number of votes should have been counted but are not available for counting, then add to the vote totals of each candidate in proportion to the votes received by the candidate in the precinct or district. 30 (Proportionality formula)

In addition, the proportionality formula must take into account the ballots cast for write-in candidates or which were blank with respect to a particular election race.31 It follows that the proportionality formula must distribute pro rata votes to all candidates whom ran for an elected office.

The Hammond court did not specifically address the situation where the number of votes that were not cast by disenfranchised voters cannot be determined. The Municipal Attorney’s Office addressed this sort of scenario following a ballot shortage after the 1989 election and concluded the denial of ballots to voters was random and not the result of any bias.32 The resolution at that time was to rely on evidence of individually disenfranchised voters to determine whether their vote would have been sufficient to affect the outcome. The Election Commission reported there was not enough actually disenfranchised voters sufficient to change the election.33

Because the proportionality formula is merely a tool, if it demonstrates the irregularities that constitute malconduct affected a number of voters sufficient to change the result of the election, then a new election should be held.34 If the proportionality formula shows

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30 In Fischer, the plaintiff argued for using units of voters smaller than a precinct or district if the votes can be traced to such smaller units, to enhance the accuracy of the reduction formula. The court rejected this argument, stating “established precinct or district levels are reasonably accurate, easy, and readily available units on which to base such determinations. Reference to those units will avoid considerable administrative difficulty, speed the recount and certification process, and will thus better serve the public interest.” Id.
32 Municipal Attorney Opinion 89-69.
33 Assembly Memorandum 983-89, Special Review of Election Procedures at p. 8.
34 There are important considerations with ordering a second election. See fn. 8, supra.
the number of voters affected is insufficient to change the results, the official count and results should stand and be certified.

B. May the Assembly call for a special election even if the failure is not sufficient to change the outcome?

When the Assembly receives the Election Commission’s report under AMC 28.80.060, it is to determine whether to certify the election as valid or take some other action. Among those actions is the option to “declare the entire election invalid and order a new election.” The Code language is structured such that this action clearly has two prerequisites: (1) the Election Commission must report “a failure to comply with the provisions of law or illegal election practices” and (2) “such failure is sufficient to change the outcome of the election.” If it can be demonstrated the failures, or malconduct, are not sufficient to change the result, the option to invalidate the results is not available and to proceed to do so would not be authorized. The Assembly would not have the authority to order a new election.

If the Assembly orders a new election without the requisite showing of errors sufficient to change the result of the April 3 election, that order would be overturned if challenged in court. A person could file suit for a declaratory judgment seeking to have such an Assembly order declared invalid. We believe without the showing of sufficiency to change results, ordering a new election would be contrary to election jurisprudence and the Alaska Supreme Court’s declaration of a public policy interest in preserving the stability and finality of an election and in making all reasonable presumptions in favor of the validity of the election.

The jurisprudence discussed in this memorandum indicates concrete numbers and specific facts should be considered, rather than conjecturally or arbitrarily determining how many voters were denied a ballot. To this end, the Election Commission Report’s Special Review of Election Procedures included in AM 983-89 was on the proper path in 1989. The investigation described therein provided an opportunity for all affected voters to come forward so the Municipality could substantiate the number of voters actually prevented from voting. In 1989, after interviewing 237 voters, the evidence was that no

35 In a converse situation, when a city council acted without authority and candidates for public office were improperly deprived of their right to appear on the ballot, the court could order a new election. Miller v. North Pole City Council, 532 P.2d 1013 (Alaska 1975). The decision was based on the city council’s lack of authority to make a decision on a candidate’s qualifications before the person is elected.
36 Dansereau at 571 (describing the Hammond case as disallowing a new election where malconduct and doubt as to the integrity of an election exist, but where the more concrete standards espoused do not indicate that the votes affected are sufficient to change the result.) Hammond had reversed the trial court’s order for a new election.
37 Sec, c.g., Miller at 1014.
38 See Part A.2., infra, and footnotes 7 and 8. The Alaska Supreme Court recognized that it has “no authority to interfere with the lawfully expressed will of the people. [unless] ... the free expression of popular will was frustrated...”. Boucher at 83.
more than 48 voters were actually prevented from voting, and that number was used in the analysis of whether the ballot shortage that year was a failure sufficient to change the result. The approach used then was sound, later substantiated by Dansereau, and we recommend the same or a substantially similar approach be used.\textsuperscript{39}

\textbf{CONCLUSION:}

Malconduct must be determined for each specific act standing on its own, and, in the absence of bias, requires knowing noncompliance or reckless indifference. Good faith on the part of election officials to enfranchise voters is a defense to allegations of malconduct. Only if malconduct is shown does the analysis then turn to whether it was sufficient to change the results of an election.

We recommend the following course of action:

1. The Election Commission should coordinate with the Clerk’s Office to review the received communications from affected voters who allegedly did not get to vote due to the ballot shortage. The Clerk’s Office should continue to encourage people to contact it about their inability to vote.

2. In addition to finishing its counting, the Election Commission should investigate and render a report to the Assembly similar to the one issued in 1989, detailing any irregularities or failures in accordance with AMC 28.80.060, and include its review of the received communications from voters described in 1. In the report, the Election Commission should determine whether there was malconduct and, if so, whether it was sufficient to change the election.

3. The Assembly may then decide whether to certify the election.

\textsuperscript{39} See, e.g., \textit{Beckstrom v. Volusia County Canvassing Bd.}, 707 So.2d 720, 725 (Fla. 1998)(holding that even in a situation in which a trial court finds substantial noncompliance caused by unintentional wrongdoing, the court is to void the election only if it finds the substantial noncompliance resulted in doubt as to whether a certified election reflected the will of the voters).